No. 84-193

In the Supreme Court of the United States

OCTOBER TERM, 1984

JO-ANNE F. WOLFSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITON

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in holding petitioner, an attorney, in criminal contempt for asking an improper question on cross-examination of a government witness in defiance of the court's express ruling.

2. Whether the district court properly employed the summary contempt procedure prescribed by Fed. R. Crim. P. 42(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 733 F.2d 441.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on May 29, 1984. The petition for a writ of certiorari was filed on July 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, who represented one of the defendants in a criminal trial of ten Chicago policemen accused of having protected drug dealers in Chicago, was summarily held in criminal contempt under 18 U.S.C. 401 for misbehavior in

the presence of the court. She was fined $300. The court of appeals affirmed (Pet. App. A1-A14).[1]

The relevant facts are set forth in the opinion of the court of appeals (Pet. App. A4-A6) and in the contempt order of the district court (*id.* at A16-A20). Those facts show that several of the defendants, including petitioner's client, owned a "clock shop" that sold clocks and other merchandise (*id.* at A4). The drug dealers whom the defendants were accused of protecting made frequent purchases from the shop at grossly inflated prices that could only have been bribes for the protection that the defendants were charged with providing to the dealers (*id.* at A4-A5). In the ninth week of trial, the government called FBI Agent William Kunzelman as a witness (Pet. App. A17). On direct examination, Kunzelman identified photographs and sales records relating to the shop's sales to drug dealers (*id.* at A5, A17-A18). On cross-examination, the following exchange took place (*id.* at A5, A18):

> BY MS. WOLFSON:
>
> Q. Is it your experience as an FBI agent that it is a crime for somebody who is engaged in selling merchandise to sell to a person whose activities are illegal?
>
> THE COURT: Well, I think that calls for a legal conclusion.
>
> MS. WOLFSON: Well, it is an FBI agent. It is a good person to ask.
>
> THE COURT: The answer to which is no.

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[1]Two weeks before petitioner was cited for contempt, the district court held another defense lawyer in this case in contempt for asking an improper question on cross-examination despite the court's repeated admonitions. See Pet. App. A2-A4. In the decision below, the court of appeals below also affirmed that judgment of contempt. *Id.* at A8-A14.

BY MS. WOLFSON:

Q. Do you know of any United States statute that you are sworn to enforce that makes it a crime —

THE COURT: Sustained.

BY MS. WOLFSON:

Q. — for a commercial enterprise to sell to a crook?

THE COURT: Ms. Wolfson, I sustained the very objection to that very question.

The court then called petitioner to a side bar conference and held her in contempt (Pet. App. A5, A18). In its subsequent written contempt order, the district court explained that "[t]he contemptuous conduct of [petitioner] consisted of asking an obviously improper question, arguing impertinently with the ruling of the court and then proceeding to ask the same question again in defiance of another ruling of the court" (*id.* at A19). The court stated that petitioner's question of Agent Kunzelman "was not intended to illicit [*sic*] a fact but was purely rhetorical" and that "it was intended to mislead the jury as to the purpose of the government's evidence concerning the clock shop" (*ibid.*). The court further concluded that petitioner's comment that an FBI agent "is a good person to ask" was "insolent and knowingly specious" (*ibid.*). On this basis, the court found that petitioner's "unprofessional conduct" was "intentional and willful" and that "[i]t was a repetition of the same kind of conduct about which the court had repeatedly admonished her" (*id.* at A20). The district court further found that "unless disciplinary action is taken against [petitioner], she will continue to defy the rulings of the court" (*ibid.*).

The court of appeals affirmed (Pet. App. A1-A14). The court held that petitioner's conduct violated both 18 U.S.C. 401(1), which authorizes the punishment of conduct that obstructs the administration of justice, and 18 U.S.C.

401(3), which authorizes punishment for contempt consisting of disobedience of or resistance to the lawful order of the court. The court of appeals explained that if defense counsel "deliberately exceeds the proper bounds of cross-examination in an effort to obtain his client's acquittal, he is violating the ground rules of the adversary struggle, and therefore obstructing the administration of justice" in violation of 18 U.S.C. 401(1) (Pet. App. A8). In this case, the court concluded that petitioner exceeded "by a wide margin" the proper bounds of questioning, "so clearly that it could be inferred that [she was] acting willfully and therefore contemptuously" (*ibid.*). The court of appeals held that petitioner also violated 18 U.S.C. 401(3) because her questioning disobeyed the court's lawful orders regarding the proper scope of cross-examination and, in addition, disobeyed the court's order sustaining an objection to the very question that she asked (Pet. App. A8).

The court of appeals also held that the district court had properly relied upon the summary contempt procedure authorized by Fed. R. Crim. P. 42(a). The court noted that the conditions set forth in Rule 42(a) were satisfied, since the conduct constituting the contempt occurred in the presence of the trial court and was seen and heard by it (Pet. App. A10). The court of appeals also explained that, in any event, the benefits to be obtained from the fuller procedures contemplated by Fed. R. Crim. P. 42(b) were insubstantial, because any possibility that the relatively modest fines were erroneously imposed was "slight" (Pet. App. A11) and there was a need to act expeditiously due to the concern that "improper questioning * * * would wreck a long trial involving grave charges of public corruption" (*id.* at A12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. Under 18 U.S.C. 401(1), a court of the United States has the power to punish by fine or imprisonment such contempt of its authority as constitutes "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." Petitioner contends (Pet. 22-27) that she could not be punished for contempt because her conduct did not "obstruct the administration of justice" within the meaning of that provision. As the court of appeals observed, it is not even clear that such obstruction was intended by Congress to be a necessary element of contempt under 18 U.S.C. 401(1) where, as here, the conduct occurs in the presence of the court.[2] But assuming arguendo that obstruction is a necessary element, petitioner's contention is nevertheless without merit.

This Court has held that the contempt remedy "was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial." *United States* v. *Wilson*, 421 U.S. 309, 315 (1975). Rather, a citation for contempt "provides an appropriate remedial tool to discourage * * * contumacious refusals to comply with lawful orders essential to prevent a breakdown of the proceedings." *Id.* at 319. Here, petitioner's conduct consisted of deliberately asking an improper and misleading question on cross-examination in direct defiance of the court's repeated warnings following similar misconduct by petitioner and

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[2]The court of appeals explained (Pet. App. A6) that "at least linguistically, the reference in the statute to obstructing the administration of justice qualifies only the liability of one who commits a contempt outside the presence of the court though 'so near thereto as to obstruct the administration of justice' * * *." However, in light of decisions of this Court indicating otherwise (see *United States* v. *Wilson*, 421 U.S. 309, 315 (1975); *In re McConnell*, 370 U.S. 230, 234 (1962)), the court of appeals assumed for purposes of the present case that Section 401(1) requires proof of an obstruction of the administration of justice even where the contempt occurs in the court's presence. See Pet. App. A7.

other defense counsel earlier in the trial and of an explicit ruling of the court regarding the specific question at issue. Such behavior clearly qualifies as an "obstruc[tion of] the administration of justice." As the court of appeals noted, the district judge, in invoking the contempt remedy, "was concerned that if the lawyers persisted in their improper questioning they would wreck a long trial involving grave charges of public corruption" (Pet. App. A11-A12).

In any event, as the court of appeals further held (Pet. App. A8-A9), petitioner's conduct also violated 18 U.S.C. 401(3), which permits a court to punish as contempt the "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." There is no express requirement in Section 401(3) that the particular court order at issue must itself have been essential to protect the administration of justice or that the conduct in violation of the order actually obstructed the administration of justice. The premise of 18 U.S.C. 401(3) is that an order of the court is to be obeyed and challenged only through lawful procedures, not simply ignored or defied because the person to whom the order is directed believes it to be erroneous. In this case, the court ordered that the specific question not be asked of the FBI agent. As the court of appeals observed (Pet. App. A8-A9), if petitioner believed that order erroneously limited the scope of her cross-examination, the proper remedy was an appeal, not defiance. See *Sacher* v. *United States*, 343 U.S. 1, 9 (1952). If misconduct such as petitioner's may not be punished by a contempt citation, then attorneys could disregard lawful court orders with relative impunity, and the trial could be reduced to anarchy.

Petitioner argues (Pet. 24-25), however, that the district court could have remedied the situation short of holding her in contempt by striking the improper question and giving an appropriate instruction. But this argument ignores the district court's findings that petitioner's behavior "was a

repetition of the same kind of conduct about which the court had repeatedly admonished her"[3] and that "unless disciplinary action is taken against [petitioner], she will continue to defy the rulings of the court" (Pet. App. A20).

Nor will the contempt citation in the circumstances of this case have a "chilling effect" on legitimate advocacy. While an attorney must be allowed sufficient latitude to "present[ ] his client's case strenuously and persistently" (*In re McConnell*, 370 U.S. 230, 236 (1962)), he or she must do so, as the court of appeals observed, "within the rules of the game." The court of appeals correctly concluded that petitioner's conduct in asking a witness for a legal conclusion in order to mislead the jury into thinking that her client's sale of merchandise to known drug dealers was irrelevant to the charge that the client was involved in a protection racket — and doing so in defiance of the district court's ruling — exceeded the bounds of proper advocacy "by a wide margin" (Pet. App. A8) and therefore clearly violated "the rules of the game."[4]

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[3]See Tr. 1190-1194, 1239-1240, 3816-3817, 4525-4527, 5035-5036, 5854-5859, 5985, 6493-6517, 8191-8198.

[4]Petitioner contends (Pet. 18-20) that the Seventh Circuit's decision in this case conflicts with two prior decisions of that court, *United States ex rel. Robson* v. *Oliver*, 470 F.2d 10 (1972), and *In re Dellinger*, 461 F.2d 389 (1972). An asserted intracircuit conflict does not warrant review by this Court. Moreover, the panel in the instant case apparently perceived no such conflict, because it cited both *Oliver* and *Dellinger* without suggesting any inconsistency with their holdings (Pet. App. A7, A9). Indeed, the panel explicitly distinguished *Dellinger* as involving conduct that was disrespectful but not contumacious, much like the conduct involved in *In re McConnell*, 370 U.S. 230 (1962). See Pet App. A9.

In *Dellinger*, which did not involve improper questioning of witnesses, the court of appeals held that the action of attorneys in continuing argument on motions and rulings after the court had expressly ordered them to cease did not rise to the level of an "obstruct[ion of] the administration of justice" under Section 401(1) where "the trial judge,

2. Petitioner also contends (Pet. 29-30) that the district court should not have utilized summary procedure when holding her in contempt. This claim is defeated by the plain language of Fed. R. Crim. P. 42(a), which provides that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." That, of course, was precisely the situation here. See *Taylor* v. *Hayes*, 418 U.S. 488, 497 (1974) (a trial judge may, "for the purpose of maintaining order in the courtroom, * * * punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him"). See also *Ex parte Terry*, 128 U.S. 289, 307-310 (1888).

Furthermore, petitioner does not indicate what process she believes would have been appropriate: a full-blown evidentiary hearing, or a simple on-the-spot opportunity to be heard. It is difficult to see what possible purpose a full-blown evidentiary hearing could have served, since the conduct constituting the contempt was personally observed

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when ordering counsel to terminate their argument or sit down, frequently added a rejoinder or coupled the order with a statement which called for a response by the attorneys." 461 F.2d at 399. In this case there was no comparable action by the trial judge that invited petitioner's conduct. Moreover, in *Dellinger*, the court of appeals, quoting *Sacher* v. *United States*, *supra*, stressed that an attorney may not defy a court order.

In *Oliver*, the court of appeals overturned an adjudication of contempt against a defense lawyer in a draft-evasion case where the lawyer convulsed courtroom spectators by showing his client a photograph of the induction station and inquiring about a nonexistent sign stating "Abandon Ye All Hope Who Enter Here." Although the conduct in *Oliver* might have momentarily interrupted the decorum of the courtroom, it was not in defiance of a court order and was found to be arguably related to a legitimate defense strategy. 470 F.2d at 12-13.

by the court and duly recorded in the court reporter's stenographic transcript, the accuracy of which is not questioned.[5] Moreover, as the court of appeals observed, there was a definite need for prompt action by the court because petitioner otherwise "might have persisted in [her] improper questioning to the point where a mistrial would have had to be declared — after more than a month of trial of ten defendants" (Pet. App. A12).

Although this Court's decisions impose no such requirement, the court of appeals did state (Pet. App. A13) that, in hindsight, it would have been better if the district court had adjourned the trial briefly to afford petitioner an opportunity to explain her behavior before holding her in contempt. If the court of appeals' suggestion is heeded in the future, the procedural issue petitioner raises should not arise. Moreover, the court correctly concluded (*id.* at A13-A14) that, even if error, the failure to afford petitioner such an opportunity was harmless in the circumstances of this case, because she and counsel for the co-defendant previously had been allowed to explain why they believed the line of questioning later held to be contemptuous was proper, and because in light of the district court's "very full and convincing explanation" in its written order, it was inconceivable that any additional procedure would have affected the outcome.

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[5]Petitioner argues (Pet. 30) that she might have been able to convince the court at a hearing that its statement — "[t]he answer * * * is no" — did not necessarily mean that she could not proceed with her question. Clearly, however, the court's statement could have had no other meaning. Petitioner also argues (*ibid.*) that she might have convinced the court that she did not hear it say "[s]ustained" when she nevertheless proceeded to ask the question following the court's ruling. However, the district court noted in its order, based on its observation, that petitioner was standing near the lectern and heard the ruling. It is highly unlikely that anything petitioner could have said would have changed the court's mind.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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